United States Circuit Court

of Appeals for the Ninth Circuit

George E. Jackson, Doing Business Under the Trade Name and Style of Southern Arizona Auto Company, Plaintiff in Error, vs. The United States of America, Defendant in Error.	No. 4046

Brief of Defendant in Error

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BRIEF OF DEFENDANT IN ERROR

The Plaintiff in Error herein assigns as error the denial by the Trial Court of his petition in intervention, asking for the return to him of an automobile sold by him under a conditional sales contract, and seized by Federal Officers while being used by his conditional vendee in the illegal transportation of liquor, and the refusal of the Court to direct the payment of the unpaid purchase price of said automobile to him from the proceeds of the sale thereof.

The trial court found as a fact that the claimant below, plaintiff in error here, had no knowledge that the automobile in question was

used or to be used in the unlawful transportation of liquor, and although the plaintiff in error now asks that the order of sale herein be vacated, and the automobile returned to him, it is apparent from his brief that he has abandoned his claim as "owner" of the automobile in question, and now relies upon his claim as a "lienor" under the provisions of Section 26 of the National Prohibition Act. However, in as much as the question as to whether a conditional vendor of an automobile is the owner thereof, or merely a lienor, is directly involved in this case, it is necessary to ascertain the exact status of the conditional vendor in order to determine the relief to which he is entitled, if any.

Counsel for plaintiff in error first points out that the recent decision of the Honorable Fred G. Jacobs, rendered at Phoenix, Arizona, is irreconcilably opposed to the recent decision of Judge Dooling in the present case, and in the Montgomery case, all decided in the District of Arizona, and involving practically the same questions.

For the purposes of this case, it will be admitted that these opposite views have been expressed in this district, Judge Jacobs following the decision of Judge Thomas in the case of the United States vs. Sylvester, 273 Federal, 256. This Court is, therefore, confronted with the question of whether a conditional vendor of an

automobile, seized while being used by the conditional vendee in the illegal transportation of liquor is entitled to the proceeds of the sale of such automobile, or so much thereof as may be necessary to satisfy the unpaid purchase price of such automobile, after payment of all costs, or briefly, whether the conditional vendor of an automobile, without knowledge that the automobile was used or was to be used in the unlawful transportation of liquor, or is a bona fide "lienor" or an "owner" within the meaning of Section 26 of the National Prohibition Act.

Counsel for the plaintiff in error asserts that "the lower Court assumed, without discussion, that the intervenor, as conditional vendor, is the owner of the automobile in question, rather than the lienor, within the meaning of the Prohibition Act, and bases his entire opinion on that assumption." It is respectfully pointed out that the lower Court not only did not assume that the conditional vendor was the owner of the automobile in question, but held directly that such conditional vendor was the owner within the meaning of Section 26 of the National Prohibition Act, not the lienor. Quoting from Judge Dooling's opinion in the case at bar (T. of R., page 28) "In either view, I adhere to the decision in the Montgomery case:

1. Because I believe that the statute requires more of the owner than of the lienor, and

2. If the Court has the discretion, I believe it should be exercised against those who deliver the absolute and unrestricted possession to another upon conditional sale, while retaining title so as to avoid foreclosures, and enable them without going into court to forfeit all payments already made to them."

Also, in the case of the United States vs. Montgomery, 289 Federal, 125, is found the following: "It is not unreasonable to suppose that Congress had in mind the fact that the owner may determine who shall have the use of the vehicle, and thus, in a measure, control such use, while a lienor may not because he is at no time entitled to its possession."

The lower Court, therefore, having distinctly held that such conditional vendor was the owner of the automobile, found from all the facts before it that "good cause" was not shown by the vendor, and denied his petition for a return of the automobile. The question as to what constitutes "good cause" is one which addresses itself solely to the sound discretion of the trial judge, and is ably discussed by Judge Dooling in his opinion in this case. (T. of R., pages 26-27). Manifestly, plaintiff in error cannot, as he has done throughout his brief, adhere to his position as owner and yet claim he has a lien on the automobile for unpaid purchase price. Neither can he assume the position of a lienor and demand

that the car be returned to him in specie, after payment of storage charges, and the lower Court in reaching its conclusion in the case at bar, was necessarily required and obliged to pass upon the question whether a conditional vendor was a "lienor" or "owner" within the meaning of the Prohibition Act before reaching its conclusion.

Counsel for plaintiff in error further contends that "so far as the Act in question is concerned, the conditional vendee, not the conditional vendor, should be held to be the owner of the automobile." (Plf. in Error Brief page 10.) And cites several instances wherein a conditional vendee or mortgagee in possession have been construed to be the owner within the particular statute or regulation under consideration, and although in such instances, the broad meaning has been given to the word "owner," under the statute of Arizona, "all words and phrases shall be construed and understood according to the common and approved usage of the language." R. S. Arizona, 1913, Par. 5552, and no such construction as contended for by plaintiff in error can be placed upon the word "owner" with reference to a conditional vendee, where, as in the case at bar, a conditional vendor has purposely and absolutely retained title to the property in himself, and, to a large extent, exercised control over the property, by requiring the vendee to insure such property for the protection of

the vendor; by prohibiting the vendee from removing the property from Arizona without the vendor's consent, and by the vendor's reserving the option of immediately repossessing himself of the automobile in the event of default by the vendee, and the forfeiture of all payments made by the latter. That the broad construction contended for by the plaintiff in error is not applicable in cases of conditional sales contracts is apparent from the very nature of the contract itself, whereby the seller retains, not a lien, but the full title. "It is a distinguishing feature of the so-called conditional sale that the title to or property in the goods remains in the seller until payment of the price. The security retained by the seller is not a lien, but a reservation of title and the right to pursue the property in specie." 35 Cyc. 652-653.

The view above expressed has been followed in the case of McArthur Brothers Mercantile Company, a corporation, vs. Francisco Hagihara, 22 Arizona, 100, wherein the Supreme Court of Arizona held that the contract for the sale of an automobile under terms and conditions similar to those in the case at bar, was a "conditional sale" and not an "absolute sale" with a mortgage back as security. In view of the decision in the above case, a conditional vendor has no lien upon property which is the subject of a conditional sales contract in Arizona. The McArthur

case arose upon a conditional sales contract executed prior to the passage of the "Uniform Conditional Sales Act" in Arizona, but was decided about two years after its passage, and the decision still stands as determinative of the status of the vendor and vendee under a conditional sales contract. The "Uniform Conditional Sales Act" of Arizona became effective prior to the execution of the contract referred to in the case at bar, and although the Act affords greater protection to the vendee under such contract by allowing, under certain conditions, a period of redemption after default, and requires the vendor to give certain notice to the vendee before sale, where the vendee has paid five hundred dollars or more of the purchase price, it in no way affects the validity or rulings laid down in the McArthur case.

It is further contended by counsel for the plaintiff in error that "to hold that a conditional vendor has the same rights as a chattel mortgagee or any lienor within the provisions of the Act would accomplish the obvious purpose of Congress, that is to penalize the guilty and protect the innocent. At the same time, the Government would not lose by such an interpretation." While it may be said that the obvious purpose of Congress in the enactment of Section 26 of the Prohibition Act was to punish the wrong-doer and protect the interests of innocent

persons, it is equally apparent that Congress recognized that an automobile or other vehicle might be used in violation of the Act, and that guilt may attach to an automobile or other vehicle itself by reason of its illegal use, regardless of the innocence of its owner. This is evident from the provision that if no claimant to the vehicle is found, it is in effect, condemned and sold by the officer who made the seizure. The mere fact that the owner is free from complicity in the offense will not relieve the vehicle from forfeiture and the burden is placed upon the owner to show "good cause" why the vehicle should not be forfeited. Such owner, because of the control which he has or retains over the vehicle, must, of necessity be held to a greater accountability than one claiming the proceeds of sale of a forfeited vehicle as a bona fide lienor. The very apparent effect of the interpretation contended for by plaintiff in error would be to constitute the various branches of the Department of Justice and other departments, to wit, the Court, District Attorney's office and Marshal, as well as the Prohibition Department, an agency for the sale of an automobile sold under a conditional sales contract and seized while being used in violation of the Prohibition Act. Rarely, if ever, will an automobile seized and sold at public auction for illegal transportation of liquor bring sufficient to pay all costs incurred by the Government and the balance due for purchase price,

with the result that the Government is put to a great expense in order to satisfy the demands of the conditional vendor. The reason, therefore, for a strict construction of the term "owner" becomes obvious, as well as the necessity of allowing a wide discretion to the trial court in determining whether or not "good cause" is shown, and it is reasonable to suppose that Congress had this situation in mind when it enacted Section 26 of the Act, and drew the close distinction, which is most apparent, between the rights and remedies of an "owner" and a "lienor." The determination of the question herein involved necessarily, in cases of conditional sales contracts, involves the determination of the question as to who is the owner of the automobile, and where, as in the case at bar, the vendor purposely and unequivocally retains title so as to protect and establish his ownership in the automobile, he cannot by any strained construction of the Act, after the automobile is seized, substantiate his claim that he is only the lienor. As pointed out by Judge Dooling in his opinion (T. of R., page 28) "So that the owner on conditional sale would have the machine returned to him, no matter how much had been paid thereon, or how little is due, and the interest of the defendant in the machine would thus be forfeited to the seller instead of th Governmnt." A conditional sales vendor is entitled to no more consideration than a mortgagee, and if he, in his dealings with the

purchaser instead of transferring title and taking a lien back chooses to surround himself with the protection and rights of ownership of an automobile, and thereby, to a considerable extent, control its use, he and not the Government must suffer the consequences of its illegal use. Any other interpretation of the Act would defeat the avowed intention and purpose of Congress to effectively put an end of the traffic in intoxicating liquors.

It is respectfully submitted that the cases above cited, as well as the recent decisions of the District Courts in California, particularly the decision of the Honorable John S. Partridge rendered on April 14th, 1923, in the case of Daniel Belli against the United States, number 12871, Southern Division of the United States District Court for the Northern District of California, First Division, are determinative and conclusive of all questions raised by the plaintiff in error in the case at bar, and that the order appealed from should be affirmed.

Respectfully submitted,
FREDERICK H. BERNARD,
Attorney for Defendant in Error.